

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

C.A. No. 09-cv-30181-MAP

ANGIODYNAMICS, INC.,

Plaintiff,

vs.

BIOLITEC, INC., BIOLITEC AG, BIOMED
TECHNOLOGY HOLDINGS LTD. and
WOLFGANG NEUBERGER,

Defendants

**EMERGENCY MOTION TO MODIFY
SUMMARY JUDGMENT BRIEFING SCHEDULE
(Request for Special Action under Local Rule 5.1(c))**

Defendants Biolitec AG, Biomed Technology Holdings, Ltd. (“BioMed”) and Wolfgang Neuberger (collectively, “Biolitec”) move to modify the current summary judgment briefing schedule so that the due date for Biolitec’s motion for summary judgment is after completion of expert depositions, which are currently scheduled for November 4 and 5, 2013. In support of this motion, Biolitec states as follows:

1. Pursuant to the Court’s June 10, 2013 scheduling order [ECF 292], expert depositions were to be completed by September 27, 2013 and the summary judgment briefing schedule is as follows:

Biolitec’s motion due:	October 25, 2013
ADI’s opposition and cross-motion due:	November 15, 2013
Biolitec’s opposition to cross-motion due:	November 29, 2013
Oral argument:	December 18, 2013, 2:00 p.m.

2. In the Court's June 25, 2013 order denying the Biolitec's assented-to motion to extend pre-trial discovery deadlines [ECF 306], the Court stated that the "parties are free to mutually agree to the requested extensions, but those extensions will not have the imprimatur of the court lest they lead to yet further requests for extensions of the remaining schedule."

3. The parties thereafter mutually agreed to extend certain deadlines, including the deadline to complete expert depositions. The expert depositions are currently scheduled to take place on November 4 and 5, 2013.

4. The parties' summary judgment motions will rely on the parties' expert reports, which have been exchanged, and the expert depositions, which will take place on November 4 and 5, 2013.

5. On October 15, 2013, Biolitec proposed to ADI the following modified summary judgment schedule in order to allow Biolitec to file its motion for summary judgment after the expert depositions on November 4 and 5, 2013:

Biolitec's motion due: November 15, 2013

ADI's opposition and cross-motion due: December 3, 2013

Biolitec's opposition to cross-motion due: December 13, 2013

6. Under this proposed modified briefing schedule, oral argument on the parties' cross-motions would remain as currently scheduled on December 18, 2013 at 2:00 p.m.

7. ADI will not agree to this proposed modification or any other modification of the current summary judgment briefing schedule. ADI has taking the position that Biolitec should be required to file its motion for summary judgment on the current due date, October 25, 2013,

before the expert depositions take place on November 4 and 5, 2013. A copy of the parties' October 15-18 email exchange on this issue is annexed hereto as Exhibit 1.

8. ADI's position is unreasonable and fundamentally unfair to Biolitec. Biolitec's ability to prepare its summary judgment motion will be seriously compromised without the opportunity to depose ADI's expert in advance. Similarly, ADI will gain an unfair advantage if it receives Biolitec's motion before the expert depositions, because ADI could use the arguments and evidence set forth in Biolitec's motion papers to prepare for the expert depositions.

9. The parties have differing recollections as to whether Biolitec raised the possibility that the summary judgment schedule might need to be modified when the parties agreed to reschedule the expert depositions. See Email Exchange (Exhibit 1). Regardless of whether or not Biolitec raised that issue, ADI should have been realized that the summary judgment briefing schedule would have to be modified if the depositions were scheduled for dates after October 25, 2013, the current due date for Biolitec's motion. ADI now seeks to gain an unfair procedural advantage, probably because it knows that otherwise it has little chance of defeating Biolitec's motion for summary judgment.

10. Accordingly, Biolitec requests that the Court modify the current summary judgment schedule by adopting the schedule Biolitec proposed to ADI set forth, *supra*, at paragraph 4. That schedule will result in the cross-motions being fully briefed by December 13, 2013, only 15 days after the motions would be fully briefed under the current schedule.

Emergency Treatment of this Motion is Necessary

11. Biolitec's motion for summary judgment is currently due on October 25, 2013, only one week from the filing date of this motion, on October 19, 2013. Unless this Court decides this motion prior to October 25, 2013, the relief sought by this motion will become moot.

CONCLUSION

The Court should modify the summary judgment briefing schedule as follows: (i) Biolitec's motion due November 15, 2013; (ii) ADI's opposition and cross-motion due December 3, 2013; and (iii) Biolitec's opposition to the cross-motion due on December 13, 2013.

LOCAL RULE 7.1 CERTIFICATION

The undersigned certify that pursuant to Local Rule 7.1 they have conferreded this issue with counsel for ADI and have been unable to resolve or narrow the issues of disagreement.

/s/ *Edward Griffith*

/s/ *Michael K. Callan*

Dated: October 18, 2013

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Counsel for Defendants Biolitec AG., Biomed Technology Holdings, Ltd. and Wolfgang Neuberger

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on this 18th day of October, 2013.

/s/ Edward Griffith

Edward Griffith